

PROTECTING RIGHTS, INFORMING AND RAISING AWARENESS

IMPLEMENTING THE GRADUATED RESPONSE PROCEDURE

Preliminary overview: A review of the graduated response procedure as implemented since 2010

The graduated response procedure in short

The graduated response procedure is an educational system designed by the legislative powers in 2009 to address the spread of illegal downloading and sharing of content online, by giving priority to channels other than criminal proceedings before correctional courts for acts of copyright infringement.

The prevention mechanism operated under Hadopi's Rights Protection Commission consists of notices sent to Internet subscribers reminding them of their responsibility to ensure that their connection is not used to download or share copyright-protected works via peer-to-peer networks.

A THREE-STEP PROCEDURE
1. The first step of the graduated response procedure consists of a notice sent to the subscriber's e-mail address as provided by the access provider.
2. Where a second instance occurs within six months of the first notice, the Commission may send the subscriber a second notice, this time both by electronic mail and letter deliverable upon signature.
3. Where a further instance occurs within 12 months following receipt of the second notice by registered mail, the Commission may send the subscriber notice that further copyright infringements have been committed from the same address and are subject to criminal proceedings on the grounds of "gross negligence".

Gross negligence¹ is deemed to have occurred here in that the Internet subscriber has failed to prevent the use of the connection for purposes of copyright infringement during the year following receipt of the second notice². The subscriber is thus subject to a maximum penalty of €500 (or €7,500, where a legal entity is concerned), while the offence of copyright infringement is punishable by a 3-year prison term and a €100,000 fine.

The public prosecutor determining possible legal action is not referred to by the Commission unless the educational phase of the graduated response procedure fails.

Through the gradual response procedure, which is implemented upstream from criminal proceedings, Hadopi contributes to raising awareness of copyright compliance requirements in an increasingly wide population of Internet users.

What the Hadopi - Rights Protection Commission does

Since September 2010 and in line with its role in protecting works and objects to which a copyright or neighbouring right is attached, the Rights Protection Commission has implemented the graduated response procedure as defined in Articles L.331-24 and thereafter of the Intellectual Property Code.

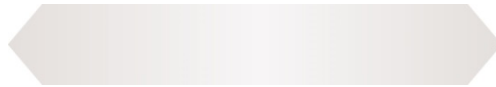
¹ Article R.335-5 Intellectual Property Code

² Article "La contravention de négligence caractérisée à la lumière de la mise en oeuvre de la procédure de réponse graduée" [Gross Negligence in the Light of the Graduated Response Procedure], *La semaine juridique* JCPG 2012, Doctr. 591.

Referral to Hadopi - CPD*
Information provided by rights holder
undergoes verification



**Rights holders
note occurrence
of actions**
Rights holders file
a written record of
events



**Internet service
provider**
Identification of
Internet subscriber
requested



1st Notice

A notice
is sent by
electronic mail
(e-mail) within 2
months



2nd Notice

Should further acts be observed
within 6 months of the date on which
the first notice was sent,
a second notice will be sent by e-mail
and by registered letter deliverable upon
signature.



Letter of Notice

Should further
acts be observed
within 12 months of
the date on which
the second notice
was sent, an e-mail
and a registered
letter deliverable
upon signature will
be sent,
recording the acts of
gross negligence
observed.
This letter informs
the subscriber that
the said acts are
subject to
punishment by law.



**CPD
Review**



**Deliberation
conclusions
addressed to
public
prosecutor**

The CPD may
decide to forward
the
case to the courts
where the
educational phase
of the graduated
response
procedure has
proven ineffective.

(*CPD: Rights Protection Commission)

Referrals to the Commission

Reports to the Rights Protection Commission on instances of copyright-protected works being shared via peer-to-peer networks come primarily from bodies dedicated to the defence of professional interests or from collecting and distribution societies, both of which are the main victims when copyright infringement occurs³. The Commission may also take action on the basis of information forwarded to it by the public prosecutor.

The referrals are written up by the rights holders' sworn agents, who conduct searches for instances of copyright infringement on protected works on peer-to-peer networks, using the work's unique fingerprint. They collect the IP addresses⁴ of the Internet access points from which the said files have been illegally shared, and save a segment of the copyright-infringing file (referred to as a "chunk"). The information is recorded in an encrypted official report, which also contains details about the work shared, copyright ownership, the peer-to-peer software and protocol used, the name of the subscriber's Internet Service Provider, and the date and time of the alleged infringement.

Since June 2010, ALPA⁵, SACEM/SDRM⁶, SCPP⁷ and SPPF⁸ have been authorised by the CNIL to collect 25,000 IP addresses per day in order to provide them to the Commission. In reality, the Commission has received nearly 100 million referrals since the graduated response system was implemented.

How the Commission identifies subscribers

When referred to on legitimate grounds, the Rights Protection Commission asks Internet Services Providers (ISPs)⁹ to disclose the identity of the Internet subscriber whose connection was used to share copyright-protected works. To enable this, it provides the IP address and date and time of the alleged infringement, as recorded in the report.

Upon receiving the response, the Commission becomes the sole party in possession of both information about the alleged infringement, as provided by the rights holders, and the identity of the subscriber, as provided by the ISP¹⁰. The data provided via secured connections are recorded in the Commission's information system, as provided for under the 5 March 2010 Decree¹¹, under conditions designed to ensure protection of personal data.

When the graduated response system was first instituted, the Commission was endowed with a "prototype" information system developed in 2009 for experimental purposes, prior to the creation of Hadopi. It had limited processing capacity and was to be replaced by the "target" information system, based on the lessons learned from the experimental phase¹².

The information system was instituted in March 2012 and made it possible to markedly increase the number of identification requests addressed to ISPs and, consequently, the number of notices. The new system is configured to process 200,000 referrals per calendar day, thus making it possible not only to process in theory all of the referrals currently made by rights holders, but also to keep pace with the increasing number of referrals sent in by both existing and new rights holders.

³ Article L. 331-24, paragraph 1 of the French Intellectual Property Code.

⁴ IP: Internet Protocol

⁵ ALPA: Association for the Fight Against Audio-Visual Piracy

⁶ SACEM/SDRM: Society of Authors, Composers and Publishers of Music/Society for the Administration of Authors' Mechanical Copyrights

⁷ SCPP: Civil Society of Phonographic Producers.

⁸ SPPF: Civil Society of Phonogram Producers in France

⁹ Orange, Bouygues, Free, SFR, Numéricâble and virtual operators such as Darty.

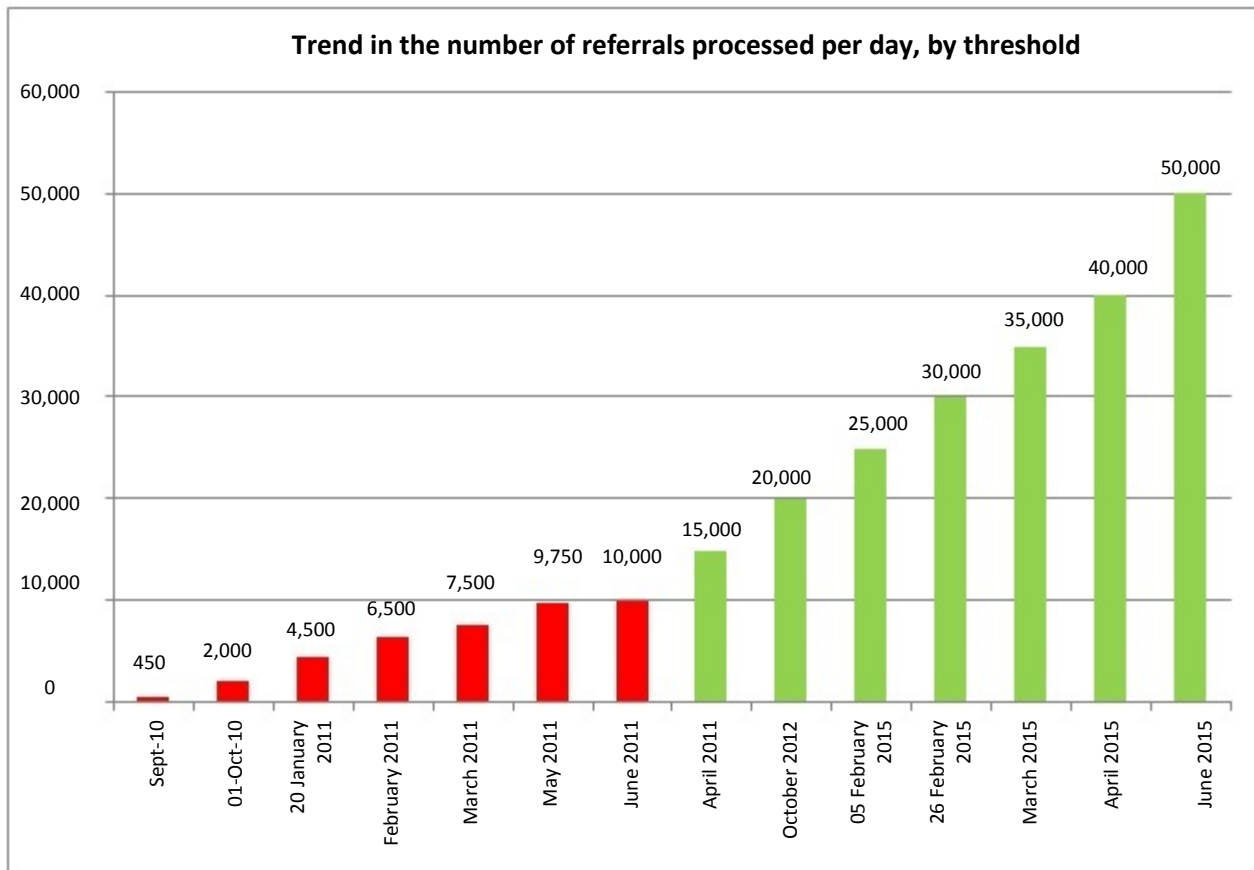
¹⁰ Constitutional Council Decisions of 29 July 2004 on the French Data Protection Act and 10 June 2009 on the Hadopi I Act

¹¹ Decree 2010-236 of 5 March 2010 regarding automated processing of personal data authorised by Article L. 331-29 of the CPI, known as "management system specific to the protection of works online"

¹² The contract signed in July 2009 regarding the implementation of the graduated response prototype information system provided for a number of identification requests not to exceed 100 per day.

- This figure rose to 1,000 referrals per day, by additional clause dated November 2009.

- By a further additional clause, signed in December 2010, the number of referrals processed per day was raised to 15,000.



- thresholds determined by the Commission, based on the contract and additional clauses relative to the graduated response prototype information system
- thresholds determined by the Commission, following the institution of the graduated response target information system

In June 2015, the Commission decided to shift to 50,000 identification requests per day, making it possible to process 50% of the referrals received, with the aim of ultimately processing 100% of them.

In total, the Commission has sent more than 18 million identification requests to ISPs since the graduated response system was implemented in September 2010. In response, the ISPs addressed 15.6 million identification reports to the Commission, bringing the total IP address identification rate to approximately 87%. The increase in identifications issued bolsters the effectiveness of the graduated response procedure:

- by strengthening awareness-raising efforts. The increase makes it possible to send out more notices. When identified subscribers are not known to the graduated response information system, the Commission may send them an initial notice;
- by more clearly highlighting repeat violations, such that the most serious cases can be brought before the law. When the subscriber has already been the target of graduated response action, the new alleged facts are added to the existing file, making it possible to send a second notice and, where applicable, transfer the case to the public prosecutor. Ultimately, the Commission has been able to use the records containing a larger number of alleged violations to develop seriousness criteria¹³ based on Internet subscriber behaviour. It consequently gives priority to the cases containing the highest number of warnings (in the event of successive procedures), or the largest number of works shared or software used.

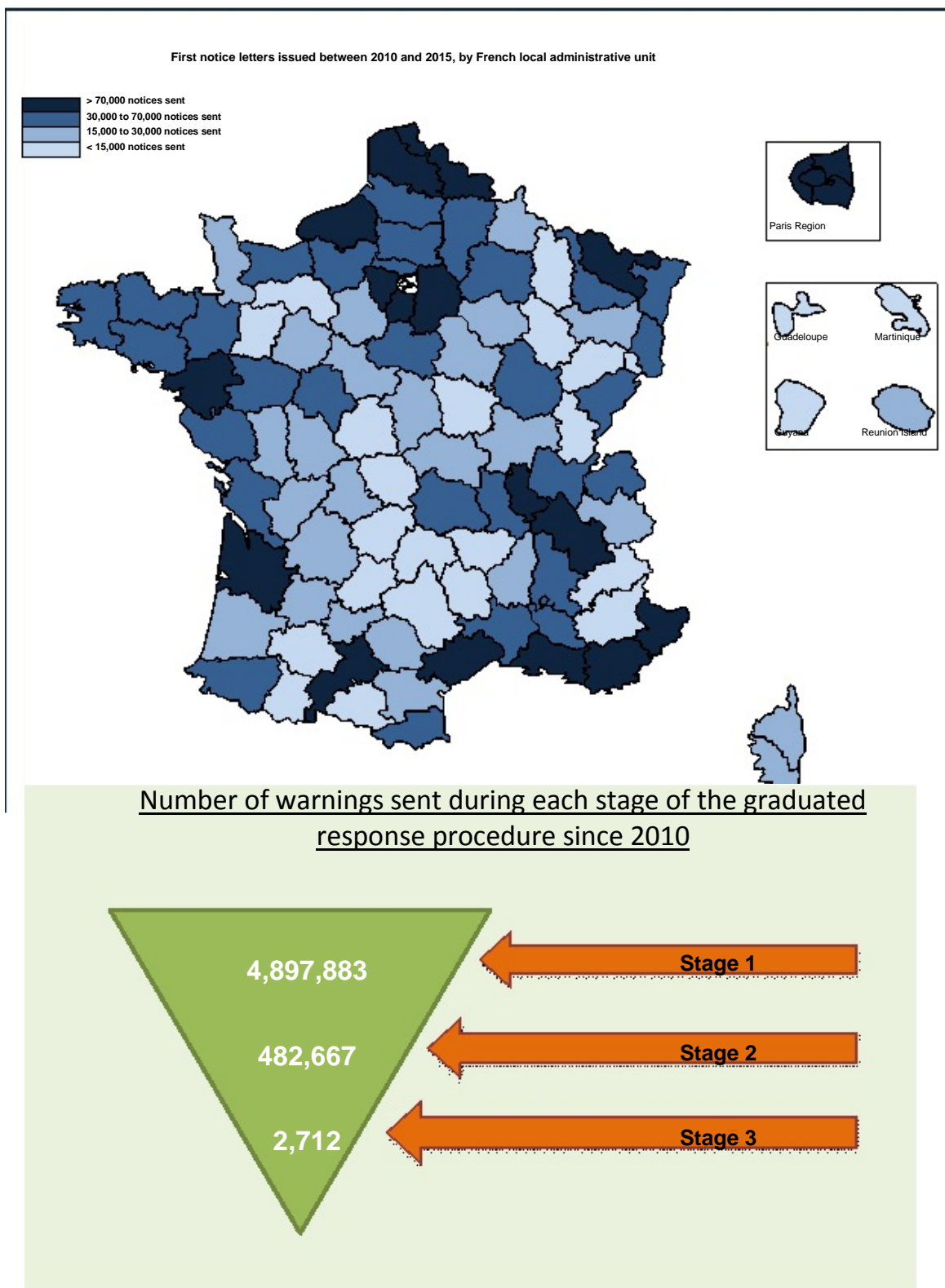
There is little doubt that, if all of the referrals could be processed, this would contribute to a finer shading of both the types of behaviours involved and the criteria on which the seriousness of the offences is determined, specifically because it would bring out the repeated violations committed by a small number of subscribers, who turn a deaf ear to educational reminders and whose actions are punishable under criminal law.

¹³ See hereafter an overview of the criteria instituted by the Commission, p. 10

Sending notices to subscribers

Since October 2010, the Commission has sent out 4 897 883 first letters of notice. Over the same period, the number of Internet subscribers on French soil has increased from 21.3¹⁴ to 26.2¹⁵ million.

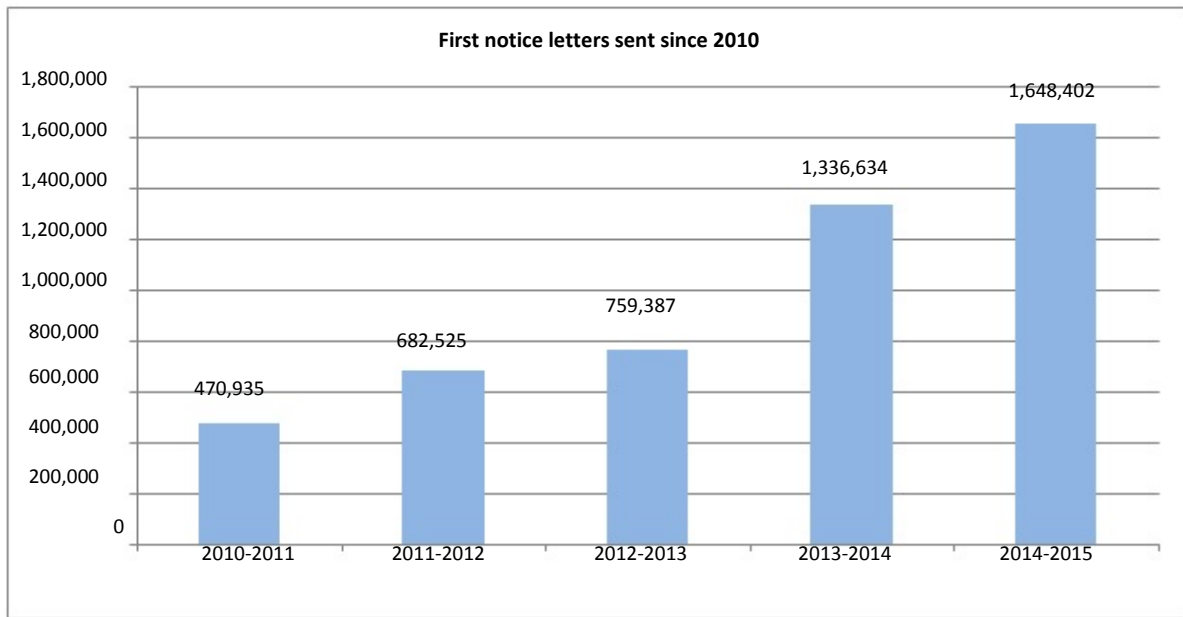
First notices are e-mailed to the owners of Internet accounts used to commit acts of copyright infringement. The notices inform them that one or more copyright-protected works (music or films, for example) have been shared via their Internet connection, and invite them to take the necessary action so that their connection is no longer used for such purposes. Lastly, it points them toward the legal content offer accessible via Hadopi's web site.



¹⁴ Quarterly Observer on Electronic Communications Markets in France - Q4 2010 - Final Results - ARCEP "The number of high-speed and very high-speed Internet connections (xDSL, cable and other technologies) reached 21.3 million as at end-2010."

¹⁵ According to the figures published by the Electronic Communications and Postal Regulation Authority (ARCEP), the number of high-speed and very high-speed Internet subscriptions in France amounted to 26.2 million as at Q1 2015 - "The high-speed and very high-speed fixed line network, ARCEP Electronic Communications Market Observer".

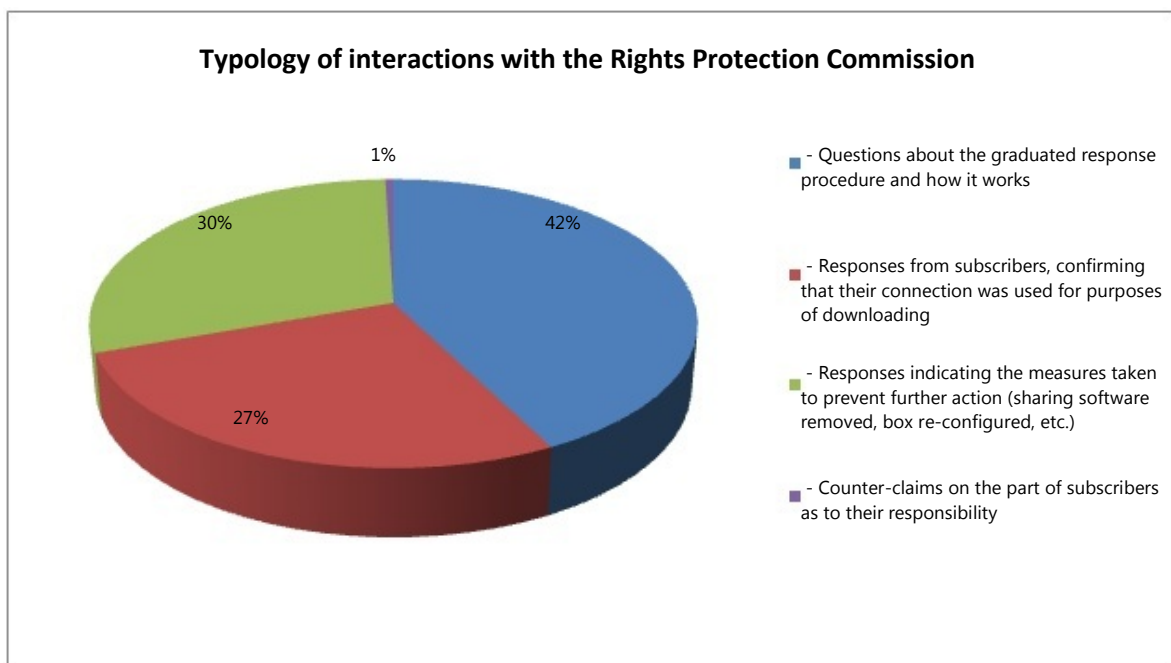
Since the graduated response system was first instituted, the number of first notices has risen every year in line with the number of identifications.



Upon receipt of the first notice, as with each stage, the subscriber may make counter-observations and request information. Since the graduated response procedure was instituted, Hadopi has received more than 400,000 such requests from notice recipients, taking into account all stages of the process.

Since the creation of an online form at Hadopi's website in February 2013, enabling subscribers to directly contact the Rights Protection Commission electronically, interaction has become considerably facilitated, thus further heightening the educational impact for Internet users. It is now the most frequently-used channel.

Respondents are in very large part private individuals¹⁶, who only wish to know the name of the work involved.



The law provides that the name of the works is not listed in the notices sent out, but may be provided to the recipient upon request. Hadopi has suggested, in a previous annual report, that this provision be modified in order to include the said information in notices.¹⁷

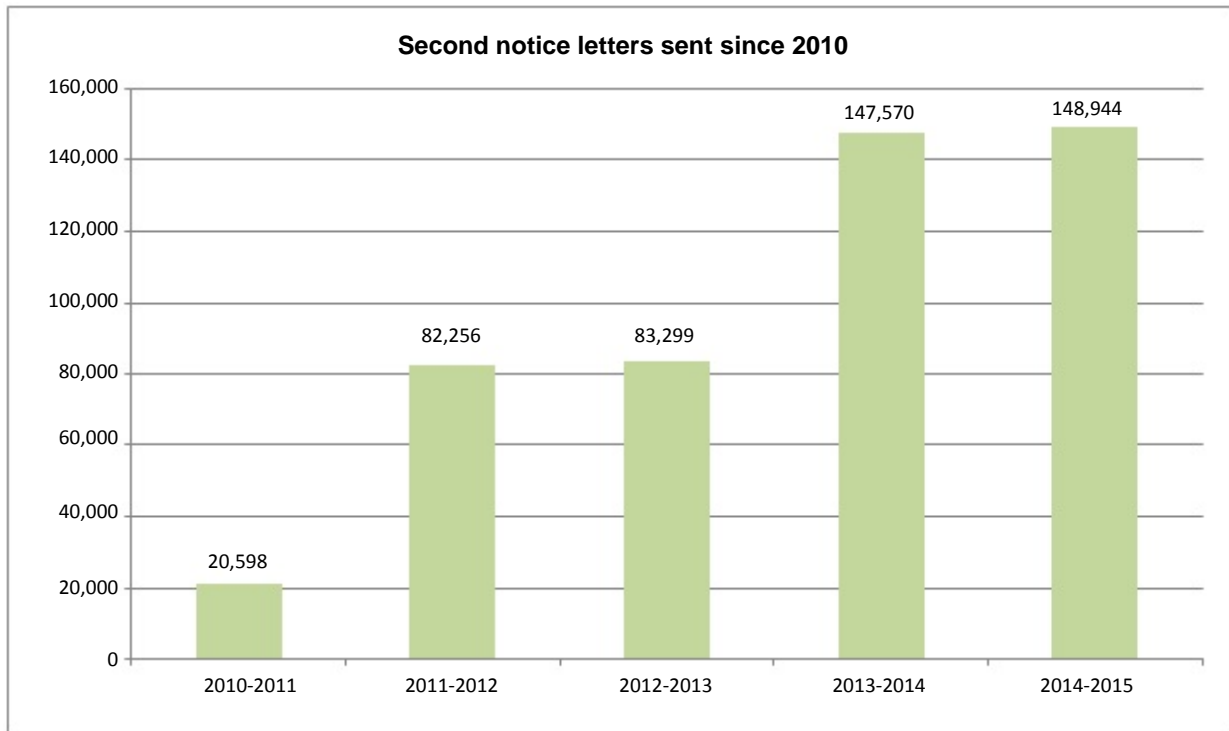
The farther along subscribers are in the procedure, the more they contact Hadopi to provide comments and have these taken into account by the Commission, before the case is possibly forwarded to the public prosecutor.

¹⁶ According to the Commission's external call centre, 92.8% of the telephone calls received between April 2013 and June 2015 came from private individuals.

¹⁷ See hereafter: "4- Allow the content of the relevant works to be included in notices " p.13

Hadopi confirms receipt of all comments from subscribers, and responds to help them understand the allegations and procedure. It also explains to them how P2P sharing software works, and details the measures that can help them secure their Internet connection so as to prevent further violations.

If further acts of infringement are observed within six months after first notice is sent, the subscriber may receive a second notice, sent by e-mail and by registered letter deliverable upon signature. In the opposite case, where no further offence is observed, the graduated response procedure is terminated.



Over the course of 2013-2014, the Rights Protection Commission outsourced management of the second notice, shifting from registered letters with proof of receipt to letters deliverable upon signature, in order to decrease costs and make it possible to send more second notices.

As announced in the last annual report,¹⁸ in April 2015 the Commission began an awareness campaign about how P2P sharing software works. Thus it sends out ordinary letters to individuals who have not made contact with Hadopi, but whose Internet connection has been used to share the same work more than once, via the same software, despite receipt of first notice.

The said letters inform subscribers that, under the default configuration of such software, copyright-protected downloads are shared, sometimes for lengthy periods of time, as soon as the computer is connected to the Internet. The letters also explain that, in order to put an end to this, subscribers can un-install the software or delete the works from their sharing library. The aim is to provide precise information tailored to Internet subscribers very early in the process, so as to prevent cases involving the sharing of a single work multiple times from being moved to the second, or even third stage of the procedure¹⁹.

Support specifically designed for professionals

Just as it strives to tailor its educational efforts to the issues which notice recipients face, the Commission deemed it important, from the start of the graduated response procedure, to provide support specifically for professionals. This decision reflects the fact that, while most graduated response procedures involve private users, professional structures too receive notices (private companies, associations, local authorities, etc.).

Like private users, professionals have a binding responsibility to ensure that their Internet connection is not used for purposes of copyright infringement²⁰. However, the context surrounding that requirement is distinct in that professionals make their Internet connection available to users. Such professionals may, for instance, include hotels, schools or reception centres that provide an Internet connection to customers, students or residents.

The Commission is contacted by professionals from the very first stages of the graduated response procedure (for instance: small and medium-sized companies that provide Internet access to their employees).

In order to help them prevent further use of their Internet connection for purposes of copyright infringement, the Commission offers all professionals a range of tailored technical solutions and awareness-raising messages to be passed on

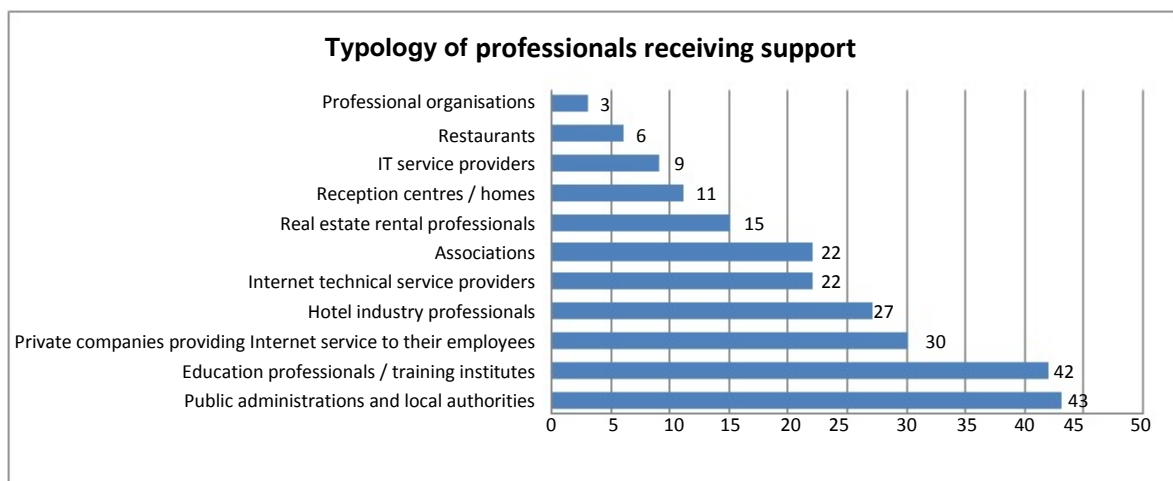
¹⁸ Annual Report 2013-2014, p. 22

¹⁹ See full Annual Report: The awareness campaign about how sharing software works, p.70.

²⁰ Article L. 336-2 of the French Intellectual Property Code.

to their users. In addition to those tools, the Commission provides tailored support over an extended period for professionals who face more specific issues (e.g., major hotel chains, Internet access providers) or who make their Internet connection available to a specific audience (students, for instance).

As at 30 June 2015, 226 structures from widely-ranging sectors have received the benefit of such support.



This specifically-targeted type of support may include several types of action:

meetings with professionals. Hadopi makes its expertise available to professionals wishing to have their network architecture analysed and discuss technical protection measures for their Internet connection and configuration;

development of user awareness tools in cooperation with the organisation concerned (information message in the newsletter, for instance);

actions aimed at those using the Internet service provided by a professional, to explain the issues at stake in copyright protection (action in institutes of higher learning to which notices have had to be sent, for instance).

In addition to informing and assisting subscribers and preventing repeat offences, these actions enable the Commission to reach all of the users in a given network. The professional receiving the notices becomes a full-fledged relay station for information from Hadopi.

The third stage of the graduated response procedure

Subscribers involved in a graduated response procedure are moved to the third stage where a repeat offence is observed during the year following receipt of the second notice. From this point, the offence may be construed as gross negligence, and is punishable by a fine of up to €5,500 where the offender is an individual and €7,500 where the offender is a legal entity.

Each case is investigated individually and reviewed by the Rights Protection Commission. Subscribers are informed, by registered letter, that the allegations brought against them are punishable by law. As of 30 June 2015, the Rights Protection Commission had sent out 2,712 notifications to this effect.

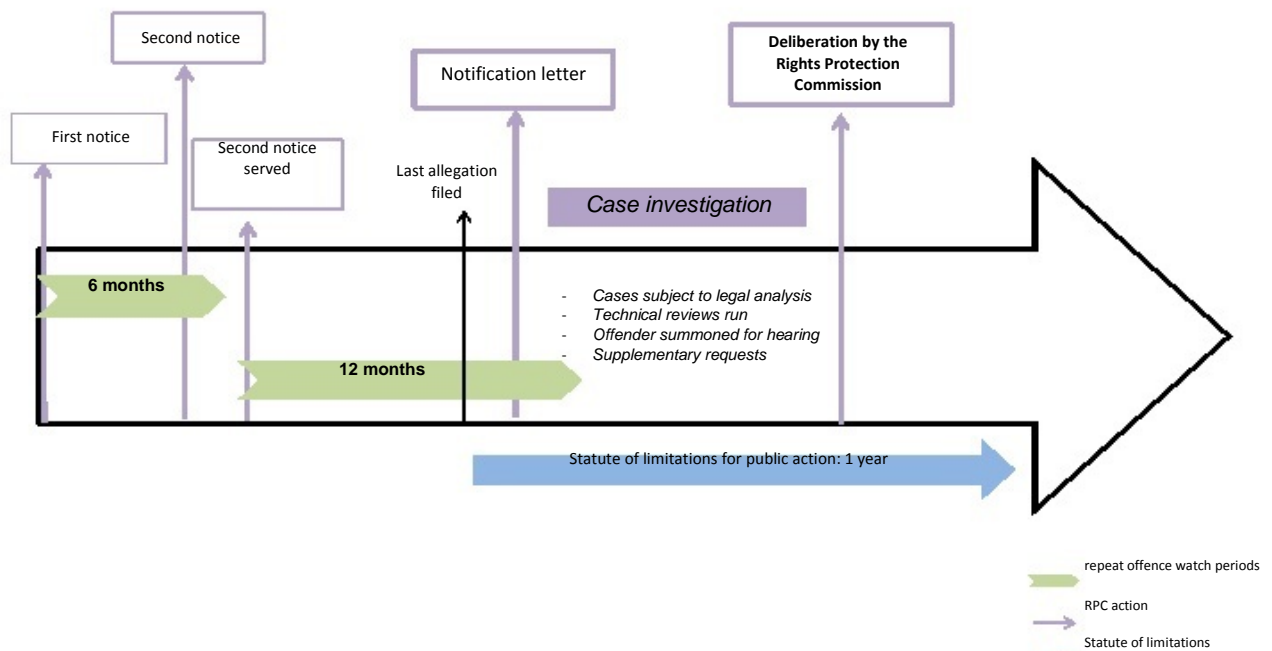
In the five years since the graduated response procedure was first introduced, the Commission has established criteria for identifying, during the third stage, the most serious cases of gross negligence:

first of all, the Commission gives priority to those cases involving the largest number of copyright-protected works shared, and in which multiple pieces of software have been installed for downloading purposes;

secondly, the Commission singles out those subscribers who have been the object of several successive graduated response procedures. This means cases in which the subscriber has already received a first or second notice, and the previous procedure was closed following the repeat offence watch period (six months following the first notice, or one year following the second)²¹. The Commission observes that these subscribers have received more warnings than others, that the educational effect has proved inadequate and that the continuing offences warrant court action. Furthermore, over the course of the year elapsed, the Commission noted for the first time that some subscribers whose case had already been transferred to the public prosecutor were once again likely to be the target of legal action for repeat gross negligence. It has notified the public prosecutor of this likelihood, providing records of the repeat offence.

²¹ The Commission is able to recognise when successive procedures have been run, insofar as the time limits on personal data storage, as provided for by the 5 March 2010 Decree, extend beyond the repeat offence observation times. Consequently, it is able to keep a record of a closed procedure for a period of 14 months, where first notice has been served, and for a period of 21 months where second notice has been served.

From first notice to deliberation by the Rights Protection Commission



When it notifies subscribers of the allegations, the Commission may also summon them to a hearing. In June 2011, when the first notices were set up, the Commission invited subscribers to attend a hearing in the third stage as a matter of standard procedure, in order to receive their comments. The hearings also had an educational dimension, making it possible for subscribers to better understand the allegations and the measures required to prevent further instances of sharing of copyright-protected works.

In practice, the vast majority of subscribers were unable to attend a hearing at Hadopi's offices, though a large number of them sent back counter-claims²². In some cases, Commission members or agents travelled to various sites across France to conduct the hearings. Seeing how this interaction took place, the Commission gradually replaced hearings by a form sent out to private users for whom a graduated response procedure had been initiated. The form enabled subscribers to better understand both the allegations against them and the measures needed to prevent further violations, as well as make comments that would be taken into account at the time of the Commission's case review.

The Commission convenes professionals and legal entities that provide an Internet connection to the public. The issues which they encounter are more complex than those of individual users and the discussions can result in the development of tailored support²³.

Last but not least, the Commission reserves the right to convene other subscribers where case investigation so requires. It should be added that subscribers always have the option of seeking a hearing, in which case, it is *de jure*²⁴.

Some procedures require supplementary investigations because questions remain as to the subscriber's identity or because there are multiple subscribers. In such cases, supplementary requests for information are addressed to the Internet Service Provider, in order to provide additional proof as to the identity of the person targeted by the procedure.

Subsequent to the investigation period and the observations made by the Commission's sworn agent, the Commission deliberates and duly notes the allegations that may be construed as gross negligence or, where applicable, copyright infringement²⁵.

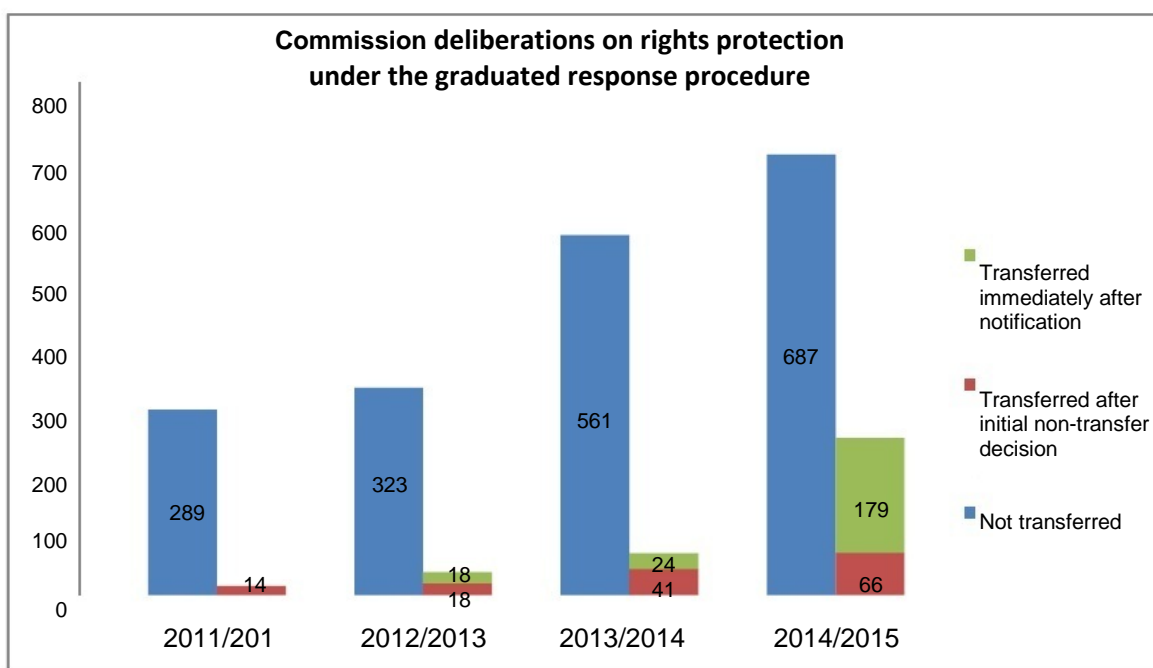
Since the graduated response procedure was implemented, the Commission has deliberated on 2,221 cases having reached the third stage of the procedure, 361 of which were transferred to the public prosecutor, or approximately 16% of all cases in the third stage.

²² As of 30 June 2014, 43.5% of subscribers had sent in responses over the course of the third stage of the graduated response procedure (2013-2014 Annual Report, p. 79).

²³ See hereafter, " Support specifically designed for professionals ", p.7.

²⁴ Article R. 331-40 of the French Intellectual Property Code.

²⁵ Articles L. 331-21 and L. 331-21-1 of the French Intellectual Property Code.



The Commission, pursuant to Article L. 331-25 of the Intellectual Property Code, has the power to assess which action should be taken further to its findings. It may decide either to transfer the case to the public prosecutor, or not to transfer the case, when it deems that the educational effect is still operative and, in particular, when it ceases to receive allegations following the notification letter.

Non-transfer decisions do not imply that the graduated response procedure has been terminated. The subscriber is informed that any further allegation made to the Commission would give rise to a re-review of the case and possible transfer to the public prosecutor. Lastly, where further instances of infringement are observed despite repeated warnings, the Commission transfers the case to the public prosecutor, except where legitimate duly-substantiated grounds can be cited. This is also the case when a subscriber, having received multiple second notice letters, has not made any comments in return.

Consequently, transfer of proceedings to the justice system does not occur unless the educational approach implemented by the Commission has not been effective in changing the subscriber's behaviour and has not prevented the occurrence of further infringements.

The Commission turns into fact the objective assigned by the Constitutional Council to the graduated response procedure in its 10 June 2009 decision, namely: "in the interest of due administration of the justice system, to limit the number of infringements potentially referred to the judicial authority."²⁶

Since the implementation of the graduated response procedure, transfer decisions have gradually increased in number and come more swiftly. This increase is due not only to the ramp-up in the procedure at all stages (50% of referrals processed, increase in number of first and second notices sent out in 2015), but also to the institution, in 2014, of criteria aimed at selecting the most serious cases during the third stage.

These criteria are based on a typology of the behaviours observed in subscribers in the third stage of the graduated response procedure²⁷:

those who remain indifferent and passive to the procedure against them: they ignore the warnings, take no action to prevent further instances of sharing from their Internet connection and do not contact Hadopi;

those whose behaviour may appear hesitant or indecisive, who have taken certain measures after receiving the notices (for instance, cutting back on or discontinuing the downloads, or informing those around them about the risks connected with using peer-to-peer software), but not effectively enough that the infringements cease;

²⁶ Decision 2009-580 DC, considering 28.

²⁷ The behaviours were identified based on a review of third-stage cases, conducted and presented in the 2013-2014 Annual Report. P. 79.

those who do not change their behaviour, or even adopt measures to side-step the law, attempting to escape the graduated response procedure. The Commission has observed "calculating" behaviours, for instance, where new peer-to-peer software comes into use after a notice is sent.

Each case transferred to the public prosecutor includes the Rights Protection Commission's deliberation, a report summarising the whole of the procedure, and all documented evidence of significance to the case, in particular the technical review of the material element of the infringement, based on the excerpt of the work included in the referral.

In all cases, the Commission informs both the rights holders from whom the referral originated²⁸ and the person targeted about the transfer.

Legal action taken further to graduated response procedures

Since 2012, when the first cases were transferred to the justice system, 82 public prosecutors have been referred to with graduated response procedures, as compared to 58 last year. This makes for more than half of the public prosecutors in France²⁹.

Over the course of the investigations conducted by the public prosecutors, subscribers are convened to be heard as a matter of standard procedure, in particular in order to record their full identity³⁰ but also to take down their comments where the said subscribers have not made prior contact with Rights Protection Commission. The hearings are conducted by the civil or military police and may also serve as an opportunity to continue the educational action, by asking the subscriber to commit to take the action needed to prevent further instances of downloading from occurring on their Internet connection.

Should the procedure no longer fall within the Commission's scope of action,

it may nonetheless be called upon by the investigating services or prosecutors. Their aim may be to seek further information about the procedure, opinions about the comments made by the subscriber, in particular the measures taken to secure the connection, or last but not least, details as to whether further allegations were received subsequent to the case's transferral.

The Commission is not always kept informed of the legal action decided upon by the public prosecutors. Since 2012, 51 rulings have been brought to its knowledge. These rulings come on average slightly less than one year after the cases are transferred, taking into account the investigations and the time required to process the case and bring it before the court.

Upon conclusion of the investigation, the public prosecutors sometimes order further notices to remind offenders of the law, implemented by the investigators or representatives of the prosecutor. These rulings may come when the subscribers explain, during the hearing, that they did not perform due diligence during the initial stages of the graduated response procedure, but commit to taking the action needed to ensure that their account is no longer used for purposes of counterfeiting. The public prosecutor then dismisses the case. In contrast, it has come to the Commission's attention that some cases have been referred to the police court, for instance, where subscribers have failed to keep their commitment to delete the sharing software installed on their computers.

Should the public prosecutor decide to take legal action against the offender, several paths are available:

settlement³¹;

penalty order further to streamlined proceedings³²;

hearing before the police court. The Commission is represented at the hearings, in order to provide details about the procedure and on technical aspects of the case.

Sentences are determined taking into account the subscriber's personal situation, behaviour, resources and judicial record. The scale of the fines imposed ranges from €0 to €1,000, with or without stay of sentence³³.

A system that is inspiring well beyond its borders³⁴

²⁸ Article R. 331-43 of the French Intellectual Property Code.

²⁹ There are 164 public prosecutors in the magistrates court system.

³⁰ The identification data provided to the Rights Protection Commission by the Internet Service Providers do not include the date, subscriber's date of birth, or subscriber's family line, all required to request an individual's criminal record.

³¹ When settlement is chosen: The subscriber is offered the opportunity to pay a fine or accept another measure, such as taking part in a good citizenship course. When the subscriber agrees, the settlement puts an end to the public proceedings.

³² The penalty order is a written proceeding in which the public prosecutor proposes a fine, which the police judge then validates. The subscriber has the right to appeal, in this instance, via objection.

³³ For reminder purposes, Decree 2013-596 of 8 July 2013 removed the additional sentence of suspended Internet access that was previously connected with gross negligence.

³⁴ In France, the National Advisory Commission on Human Rights (CNCDH) has put forth a mechanism explicitly drawing inspiration from Hadopi's graduated response system, in its 12 February 2015 opinion on the fight against hate messages online. One of the measures it includes is a graduated system of response to hate messages online, whereby warnings are issued to the Internet users responsible for these messages, informing them of the offence committed and the penalties applicable (Recommendation No. 13).

The graduated response system is not the only instance of a warning mechanism designed to raise the awareness of Internet users about acts of copyright infringement online. There now exist, in other countries, similar copyright protection mechanisms.

The French graduated response system results from an effort to strike a balance between the rights and liberties of Internet users and copyright holders, with regard to the respective roles played by the courts and by the public authorities.

Other countries have drawn inspiration from France's graduated response system, including Canada, the United States, New Zealand and Taiwan. In keeping with their respective legal traditions, the countries have instituted mechanisms either by law, or based on contractual agreement between the rights-holders and Internet Service Providers.

These systems have been designed as an educational stage prior to potential legal proceedings instigated by the rights holders or to possible disciplinary action against Internet users.

In the initial stage, they are designed to remind Internet users of the law and of the possible penalties, via warnings issued by e-mail.

The possible legal proceedings or penalties do not come into play unless the offence is repeated, after various stages have been completed (the said stages being defined to varying extents depending on the country). Some systems, like that of France, put the emphasis primarily on awareness-raising, while also promoting the legal content offer (Australia, United Kingdom, Switzerland)³⁵.

A review of changes in the graduated response procedure

Through its experience in implementing the graduated response system, the Commission has come to reflect on possible directions for the existing procedure.

Recently, the Commission has run research concurrent to that initiated by the Senate's Information Task Force on Hadopi, in order to consider various options for shifting from an administrative penalty or set fine system to a standing legal organisation. It addressed its conclusions to the Senate Task Force.

In 2013, the Commission recommended legislative or regulatory action to make the procedure more efficient³⁶. To the extent that the said proposals are still valid, they have been listed below. It should be specified that one of them has already been used as the foundation for a Government Order, in July 2013.

Proposed legislative and regulatory action to optimise the procedure

1 - Enable authors to directly refer to Hadopi

Under Article L. 331-24 of the French Intellectual Property Code, the right to refer directly to Hadopi is currently reserved for sworn or authorised agents designated by properly-constituted professional defence bodies, collection and distribution societies, and the National Centre for Cinematography and Animated Pictures.

Hadopi, however, is regularly called upon by authors who have found their works available on peer-to-peer networks and want to ask Hadopi to implement the graduated response procedure. The Commission proposes that Article L. 331-24 of the French Intellectual Property Code be modified in order that authors may directly refer cases to Hadopi, drawing upon a statement of facts by a judicial officer, as applies in the event of counterfeiting.

2 - Extend the time-frame during which public prosecutors may transfer cases of copyright infringement to Hadopi

Public prosecutors may transfer copyright-infringement cases to the Commission to have the graduated response procedure implemented. When an act of copyright infringement is reported by a rights holder, the public prosecutor may choose to transfer the case to Hadopi, where the party responsible for the acts of copyright infringement has not been identified, or where he or she wishes to order a reminder of the law, rather than take legal action before the court.

Insofar as the Commission may not be referred to on instances dating back more than six months³⁷, it is difficult in practice for public prosecutors to complete their investigations before considering the use of graduated response as the preliminary means of action.

In order to enable broader use of this alternative to legal action, the time-frame within which the public prosecutor may refer to the Commission could be extended to one year, and would then match the statute of limitations on violations of the law.

3 - Allow the source port to be listed in case reports referred to the Commission

Information referred to the Commission includes the IP

address of the Internet connection used and the time at which the acts of infringement were observed, so that the subscriber can be identified.

³⁵ See Appendix 3, Summary chart on "[Systems developed to fight online copyright infringement today, by country](#)". The summary is the result of Hadopi's international observation work (see page 140).

³⁶ 2012-2013 Annual Report, p. 71 and thereafter.

³⁷ Article L. 331-24, paragraph 3 of the French Intellectual Property Code.

As there is a shortage of IP addresses, Internet Service Providers may share IP addresses between several different users, in which case they need the references of the "source port"³⁸ in order to identify the subscriber.

The opinions issued by the French Data Protection Authority (CNIL) on 10 and 24 June 2010 already authorise rights holders to collect the port number and transfer it to the Commission. The Commission thus recommends that the Appendix to the 5 March 2010 Decree be modified so as to allow the number of the source port used to be processed as well.

This change would be all the more beneficial as it would enable professionals who share their Internet connection with third-parties to identify end-users responsible for copyright infringements and to inform them of the issues at stake and the impact of their actions.

4- Allow the content of the relevant works to be included in notices

Article L. 331-25 of the French Intellectual Property Code provides that notices sent out by Hadopi to subscribers as part of the graduated response procedure must not disclose the name of the works shared.

Even though the new notices now include the name of the peer-to-peer software used so as to clearly reflect the source of the copyright infringement, the majority of those who contact the Commission after having received a notice do so in order to learn the name of the works downloaded or shared via their Internet connection. They do not understand why this information is not listed in the notice, or why they are required to take additional action in order to receive it.

A change to the legislation, making it possible to include the name of illegally shared works in the notice itself would satisfy users without breaching confidentiality requirements, insofar as the recipient of the notice and the recipient of the information on the work in question are one and the same person (namely, the subscriber).

5 - Entrust Hadopi with direct responsibility for sending notices

Further to the provisions of Article L. 331-25 of the French Intellectual Property Code, it is the Internet Service Providers which send out notices by e-mail.

In order to simplify the system, the Commission could take responsibility for e-mailing notices directly to subscribers. For that purpose, it is recommended that Article L. 331-25 of the French Intellectual Property Code be modified.

6- Transfer responses to identification requests via digital media compatible with the Rights Protection Commission's processing system

This proposal, made in the 2012-2013 Report, was taken into account and reflected in Decree 2013-596 of 8 July 2013, facilitating communication between the Commission and Internet Service Providers (ISPs), in particular so-called "virtual" ISPs, which do not have proprietary technical resources and use those of other service providers.

Article R. 331-37 of the Intellectual Property code was modified by Article 1 of the Decree in order to allow identification reports to be transferred to the Commission via digital media compatible with its processing system, where exchanges do not take place using an interconnection with the automated processing system.

³⁸ The port makes it possible to distinguish between different applications or connections on a given computer. A port is identified by a number between 0 and 65,535. A source port is the port used by a computer to originate a connection, and a destination port is the port used by the computer at the other end of the said connection.